

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cv. No. 2009/03711

BETWEEN

MERLIN SAMLALSINGH

Claimant

AND

THE MINISTRY OF PLANNING, HOUSING AND THE ENVIRONMENT Defendant

**Before The Honourable Madame Justice Dean-Armorer**

**APPEARANCES**

Ms. Cindy Bhagwandeem for the Claimant.

Ms. Giselle Jackman for the Defendant.

**REASONS**

***Introduction***

1. On the 30<sup>th</sup> of September 2011, I delivered an oral ruling granting to the Claimant a declaration under the *Freedom of Information Act (FOIA)*<sup>1</sup>. I also refused the Claimant's application for an order of Mandamus on the ground that such an order would have served no useful purpose. The Court also ruled that the Defendant was entitled to withhold the information sought and by virtue of section 33(1)(d) of the FOIA<sup>2</sup>. My reasons are set out below.

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<sup>1</sup> Freedom of Information Act (FOIA) Ch 22:02

<sup>2</sup> Section 33(1) (d) Freedom of Information Act Ch 22:02

### ***Procedural History***

2. On 13<sup>th</sup> October, 2009, the Claimant, Merlin Samlalsingh obtained the Court's leave pursuant to ***Part 56 Rule 3*** of the ***Civil Proceedings Rules 1998***<sup>3</sup> to apply for judicial review in respect of the failure of the Ministry of Planning, Housing and the Environment to supply him with information sought under the ***FOIA***.
  
3. In particular, the Applicant sought the following relief:
  - a. A declaration that the Defendant breached its statutory duty in section 15 of the FOIA to take reasonable steps to enable ... the applicant to be notified of the approval or refusal as soon as practicable but in any case not later than thirty days after the day on which the request is duly made.*
  - b. An order of mandamus to compel the Defendant to make a decision on the Claimant's FOIA request within seven days whether his application has been approved or refused in accordance with section 15.*
  - c. Alternatively or additionally a declaration that the Claimant is entitled to access to the requested information.*
  - d. Costs.*
  - e. ... further or other relief."*
  
4. The Claimant relied on two affidavits sworn by himself and filed respectively on 23<sup>rd</sup> November, 2009 and 1<sup>st</sup> February, 2010. An affidavit sworn by Hemawatee Boodhai on 1<sup>st</sup> February, 2010 was also filed on behalf of the Claimant.
  
4. The Defendant relied on the following affidavits:
  - Miguel Rawlins 14<sup>th</sup> January, 2010. Two paragraphs of Mr. Rawlins' affidavit were struck as being inadmissible.
  - Juliana Johan-Boodram Permanent Secretary, Ministry of Housing filed 1<sup>st</sup> July, 2010.
  - Supplemental affidavit of Juliana Johan-Boodram.

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<sup>3</sup> Civil Proceedings Rules 1998 of Trinidad and Tobago

- Affidavit of Deborah Jean-Baptiste Samuel.

## Facts

1. The Claimant is a resident of St. Joseph's Village, San Fernando and has alleged that he has had serious concerns in respect of the development of Renaissance Suites which was at the time of this application being constructed a short distance from his dwelling.
2. Motivated by his concern, the Claimant applied to the Ministry of Housing under the **FOIA** for the following documents:

*“Copies of any or all documents pertaining to the Town & Country planning approval in respect of Renaissance Suites located at 44-46 St. Joseph's Village. Copies of any application for approvals, letters etc. on file relating to this development ...”*

In his supporting affidavit the Claimant disclosed his rationale for his application under the **FOIA**. He had cause to suspect that the Renaissance Suites development was in contravention of certain restrictive covenants which prohibited and buildings other than private dwellings.

3. Ms. Juliana Johan-Boodram the Acting Permanent Secretary in the Ministry of Planning Housing and the Environment wrote to the Claimant's attorneys on 24<sup>th</sup> August, 2009. She acknowledged receipt of the application under the **FOIA** and advised that the application was receiving the Ministry's urgent attention.
4. The Defendant contends that the Ministry issued a response to the Claimant on 1<sup>st</sup> September, 2009. The response, by way of a letter dated 1<sup>st</sup> September, 2009 was signed by the Acting Permanent Secretary of the Ministry. The relevant portion of the letter is set out below:

*“Please be advised that information requested is not listed as public information under the Freedom of Information Act and as such is not*

*available for public scrutiny. Only the decision letters are listed as public documents and are available for public scrutiny ...”.*

The Permanent Secretary annexed a copy of the approval letter and indicated that the Public Register of the Town and Country Planning Division was available for scrutiny. In support of their contention, the Defendant relied on the evidence of Miguel Rawlins, paralegal officer at the Ministry.

5. The substance of the affidavit of Mr. Rawlins was struck on 19<sup>th</sup> May, 2010 on the ground that it constituted inadmissible hearsay. Nonetheless, learned attorneys for the Defendant referred to the affidavit of Mr. Rawlins as though it were intact. Even if portions this affidavit had not been struck out in my view Mr. Rawlins’ testimony would not come to the rescue of the Defendant. Mr. Rawlins, in his affidavit of 13<sup>th</sup> January, 2010 referred to the letter dated 1<sup>st</sup> September, 2009 and to the procedure which obtains at the Ministry for the dispatch of letters. He deposed that a note is made in the Ministry’s Minute Sheet when letters are dispatched. He then annexed a copy of the Minute Sheet for September, 2009, which recorded the dispatch of a letter from the Permanent Secretary, Ministry of Planning and Housing to Kent Samlal on 1<sup>st</sup> September, 2009.
6. The Claimant relied on two affidavits in order to contradict the testimony of Mr. Rawlins. In his own affidavit in reply, filed on 4<sup>th</sup> February, 2010, Mr. Samlalsingh deposed that he was instructed by his attorney-at-law that the letter of the 1<sup>st</sup> September, 2009 was never received by the attorney.
7. The Claimant also relied on the affidavit of Hemawatee Boodhai filed on 1<sup>st</sup> February, 2010. Ms. Boodhai outlined the procedure adopted by the law firm of Freedom House, for the reception and filing of incoming correspondence. Ms Boodhai testified that letters are first logged in a mail receipt book and placed before the attorney who has conduct of the matter. Ms Boodhai testified that the letter of 1<sup>st</sup> September, 2009 was never received by Mr. Samlal.

8. The letter of the 1<sup>st</sup> September, 2009 was also the subject of the affidavit of Ms. Juliana Johan-Boodram. At paragraph 9, the Acting Permanent Secretary stated:

*“By letter dated the 1<sup>st</sup> September, 2009, a response was forwarded by the Ministry to the Claimant in relation to the said request ...”.*

Like Mr. Rawlins, this witness testified that the response by letter dated 1<sup>st</sup> September, 2009 was forwarded to the Claimant’s Attorney-at-law. No evidence is provided however to contradict the evidence of Ms. Boodhai that no letter was received by the officer of Freedom House. Such evidence would have taken the form of the standard affidavit of service which is relied upon in Court proceedings at least on a daily basis.

9. In determining this issue of fact that Court was not assisted by cross-examination. In my view cross-examination was not necessary since there was no direct conflict of fact. Mr. Rawlins testified that the letter was dispatched. This witness fell short however of testifying that the letter was delivered to the office of Kent Samlal. It would have been in keeping with standard practice to require the recipient of a letter to sign a letter book as having received it and thereafter to produce an extract of the signed book to prove receipt.

The Defendant has however, produced no evidence to show that the letter which was dispatched was in fact delivered. Accordingly, I accept the testimony of the Claimant that the letter of 1<sup>st</sup> September, 2009 first came to the attention of the Claimant at the first Case Management Conference on 30<sup>th</sup> November, 2009.

10. Following the Case Management Conference on 30<sup>th</sup> November, 2009, learned attorneys-at-law for the Defendant continued their efforts at arriving at an amicable resolution.

Three letters, signed on behalf of the Solicitor General were sent to Mr. Kent Samlal, attorney-at-law for the Claimant. The letters which were dated respectively 1<sup>st</sup> December, 2009, 14<sup>th</sup> December, 2009 and 1<sup>st</sup> April, 2010, were produced to the Court as exhibits to the affidavits Deborah Jean-Baptiste filed herein on 30<sup>th</sup> June, 2010.

11. In her letter of the 1<sup>st</sup> December, 2009, learned attorney-at-law, Ms. Jackman attached a copy of the letter of the 1<sup>st</sup> September, 2009, which had allegedly been forwarded to Mr. Samlal since October, 2009.
12. By her second letter of the 14<sup>th</sup> December, 2009, Ms. Jackman informed Mr. Samlal of his client's right to have recourse to the Ombudsman under section 38 (A)<sup>4</sup> of the **FOIA**.
13. In her last letter, learned attorney-at-law, Ms Jackman enclosed an additional requested document, that is to say a "*Notice of Grant of Permission to Develop Lands*" dated 1<sup>st</sup> September 2009. Ms. Jackman also stated the Defendant's position in respect of the remaining documents, stating reasons why they should not be produced.

### ***Submissions and Law***

14. Learned attorneys relied on their written submissions. In a well-structured submission, Ms. Jackman and Ms. Alleyne identified two preliminary issues:
  - Whether the Claimant has sufficient *locus standi* to maintain the current judicial review proceedings.
  - Whether the current judicial review proceedings should be dismissed.
15. Learned attorneys identified the following two substantive issues:
  - Whether the requested information which has not already been disclosed ... fell within the ambit of recognized exemptions under the **FOIA**.
  - If yes, whether giving access to the requested documents is justified in the public interest.
16. In support of their arguments that the Claimant lacked *locus standi* to institute these proceedings learned attorneys relied on the following authorities:
  - ***Celia Balroop v PSC*** H.C.A. #463/2005<sup>5</sup> per Pemberton J.
  - ***Chandresh Sharma v The Integrity Commission*** H.C.A. #2005/ 2004 and Civ. App 51 of 2005.<sup>6</sup>

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<sup>4</sup> Section 38 (a) Freedom of Information Act Ch 22:02

<sup>5</sup> ***Celia Balroop v Public Service Commission*** H.C.A. #S-463 of2005 per Pemberton J.

<sup>6</sup> ***In re an application of Sharma, Chandresh, Member of Parliament for leave to apply for Judicial Review... Sharma, Chandresh v The Integrity Commission*** H.C.A. #2005/ 2004 and Civ. App 51 of 2005

On the general principle of the requirement of *locus standi* in judicial review, learned attorneys cited H.C.A. #45 of 2004 *Angela Ramdeen v Registrar of the Supreme Court*.<sup>7</sup>

The cited cases of *Celia Balroop* and *Chandresh Sharma* clarify the nature of judicial review in the context of the *FOIA*. Both decisions emphasised that the only difference between judicial review proceedings under the *FOIA* and judicial review proceedings generally is that in the former the proceedings are to be heard by a judge in chambers. All cited judgments expressed the view that judicial review proceedings in the context of the *FOIA* ought to adhere to all other requirements of judicial review proceedings. Accordingly, there is no contention in this action that the Claimant was somehow relieved of the obligation to satisfy the requirement of *locus standi*.

17. Learned attorneys for the Defendant argue however, that the Claimant was only on a fishing expedition and had no good ground for taking action against Renaissance Suites and by extension the Claimant had no good ground for making the FOIA application.
18. In order to obtain relief under the *FOIA* a Claimant is required to satisfy the court that he is an aggrieved person for the purpose of section 39<sup>8</sup> of the *FOIA* which provides:

*“For the removal of doubt a person aggrieved by a decision of a public authority under this Act may apply to the High Court for judicial review ...”*

19. In my view, a person is aggrieved for the purposes of the *FOIA* if his application under the *FOIA* is not treated, both in terms of timeliness or substance, as that statute requires. If the application is not answered within the time prescribed by the Act, the applicant may be justified in his contention that he is aggrieved. He may approach the Court under section 39<sup>9</sup>. Similarly, if he is of the view that the public authority was incorrect in

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<sup>7</sup> *In re an application by Angela Ramdeen for leave to apply for judicial review. Between Ramdeen, Angela v The Registrar, Supreme Court of Justice* H.C.A. #45 of 2004

<sup>8</sup>Section 39 Freedom of Information Act CH 22:02

<sup>9</sup> *ibid*

refusing him access to certain documents, he is aggrieved and may institute judicial review proceedings, as contemplated by section 39<sup>10</sup>.

In my view he is not thrown out of the ambit of section 39<sup>11</sup> because he lacks good reason for seeking access to public documents. The fact that he has sought access and has not been provided with access in accordance with the *FOIA* renders him an aggrieved person for the purpose of section 39<sup>12</sup>.

20. Learned attorneys-at-law for the Defendant contend that the Claimant was culpable for his non-disclosure of the receipt of the letter of 1<sup>st</sup> September, 2009. They argue as well that the proceedings should be dismissed because the Claimant failed to acknowledge receipt of the letter of 10<sup>th</sup> April, 2010 in his later affidavits.
  
21. I will first consider the more recent letter that is to say the Claimant's failure to acknowledge the April, 2010 letter. The requirement of full and fair disclosure in judicial review proceedings is a burden that is placed on the Claimant at the time of seeking the Court's leave to apply for judicial review. The application for leave is *ex parte* and at this stage, the Claimant enters a contract with the Court to make full and fair disclosure. The learning in this regard emanates from *R v Kensington Income Tax Commissioners ex parte Princess Edmond de Polignac*<sup>13</sup>. The doctrine has been re-iterated and applied in local authorities over the past three decades.

The doctrine is however applicable at the leave stage, when the Claimant is required to make full and fair disclosure to the court. Accordingly, in my view, after leave has been granted and the Claimant has served the application for judicial review on the Defendant, any omission to refer to letters would not be regarded as material non-disclosure which would result in the dismissal of the proceedings.

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<sup>10</sup>Section 39 Freedom of Information Act CH 22:02

<sup>11</sup> *ibid*

<sup>12</sup> *ibid*

<sup>13</sup> *R v Kensington Income Tax Commissioners ex parte Princess Edmond de Polignac* [1917] 1 KB 486

In respect of the pre-leave omission, I have found on a balance of probabilities that the Claimant never received the letter of 1<sup>st</sup> September, 2009 and accordingly cannot be fixed with a responsibility to disclose same.

22. There was no dispute that the only correspondence allegedly sent to the Claimant was the letter of the 1<sup>st</sup> September, 2009. The Claimant received no notification within the thirty days prescribed by the Act and accordingly, it is my view that the Claimant is entitled to the first declaration sought.
23. I disagree that the declaration is academic. The lack of a timely response from the Ministry made it necessary for the Claimant to seek judicial review and therefore cannot be deemed academic.

The same cannot be said for the second relief sought. The Claimant sought an order of Mandamus to compel the Defendant to make a decision within seven days. It was abundantly clear since the first Case Management Conference in this matter that a decision had already been made since September, 2009.

The decision has been communicated to the Claimant and to his lawyer many times since then. It would accordingly serve no useful purpose at this stage to grant an order of Mandamus.

Accordingly it is my view that the Claimant was fully entitled to institute proceedings under section 39<sup>14</sup>. Whether he is entitled to documents sought is a separate issue.

24. I respectfully agree with learned attorneys for the Defendant that the Claimant is not entitled to material contained in a public register. Section 12<sup>15</sup> provides:

*A person is not entitled to obtain, in accordance with the procedure provided for in this Part, access to—*

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<sup>14</sup> Section 39 Freedom of Information Act Ch 22:02

<sup>15</sup> Section 12 Freedom of Information Act Ch22:02

- (a) *a document which contains information that is open to public access, as part of a public register or otherwise, in accordance with another written law, where that access is subject to a fee or other charge;*
- (b) *a document which contains information that is available for purchase by the public in accordance with arrangements made by a public authority;*
- (c) *a document that is available for public inspection in a registry maintained by the Registrar General or other public authority;*

I also agree that the Ministry was entitled to refuse access to documents which fall under section 33(1)(d)<sup>16</sup>.

The Ministry, by section 33<sup>17</sup> is entitled to take into account that the documents in question have consistently been treated by a third party as confidential. Whether the Ministry, as a public authority takes into account the confidential nature of documents, is a matter for their discretion and in the absence of irrationality, falls beyond the Court's power, reach and jurisdiction. The Court does not sit as an appellate court in respect of the decisions of the public authority.

25. The Claimant argues that he was not a competitor of Renaissance Suites and that this renders section 33(1)<sup>18</sup> irrelevant. The provisions of section 33(1)<sup>19</sup>, are:

*33. (1) A document is an exempt document if—*

- (a) *its premature disclosure under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to have a substantial adverse effect on the economy of Trinidad and Tobago, including but not limited to, the premature disclosure of proposed introduction, abolition or variation of any tax, duty, interest rate, exchange rate or instrument of economic management;*

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<sup>16</sup> Section 33 (1) (d) Freedom of Information Act Ch 22:02

<sup>17</sup> *ibid*

<sup>18</sup> *ibid*

<sup>19</sup> *ibid*

*(b) its disclosure under this Act would be contrary to the financial interests of the public authority by giving an unreasonable advantage to any person in relation to a contract which that person is seeking to enter into with the public authority for the acquisition or disposal of property or the supply of goods or services;*

*(c) its disclosure under this Act, by revealing information to a competitor of the public authority, would be likely to prejudice the lawful commercial activities of the public authority;*

*(d) subject to subsection (4), it contains information obtained by a public authority from a third party who has consistently treated it as confidential and the disclosure of that information to a competitor of a third party, would be likely to prejudice the lawful commercial or professional activities of the third party;*

*(e) its disclosure under this Act would be contrary to the public interest by reason that it would disclose instructions issued to, or provided for the use or guidance of, officers of a public authority on the procedures to be followed or the criteria to be applied in negotiation, including financial, commercial and labour negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities relating to the financial property or personal management and assessment interests of the State or of a public authority.*

The applicability of this sub-section to the information sought is within the discretion of the Defendant. It bears repetition that the Court is not at liberty to substitute its own opinion for that of the Defendants. The Court may review the Defendants decision if the Claimant establishes the existence of one or more grounds identified at section 5 of the Judicial Review Act 2000<sup>20</sup>.

In my view, none of these grounds have been shown to exist. Moreover there is nothing in section 33 (1) (d) to suggest that the subsection protects information provided by a third party only when the information is sought by a competitor. It is not inconceivable

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<sup>20</sup> Judicial Review Act Ch. 7:08.

that the material provided to a non-competitor could become available to a competitor by virtue of the documentary stable doors being opened. In my view therefore, the Defendant was justified in withholding access on the grounds of section 33 (1) (d).

***Orders:***

1. It is declared that the Defendant breached its statutory duty in section 15<sup>21</sup> of the ***FOIA*** to take reasonable steps to enable the application to be notified of the approval or refusal ... not later than thirty days after the day on which the request was duly made.
2. The Defendant do pay to the Claimant costs to be quantified by the Registrar of the Supreme Court in default of agreement.

Dated this 19<sup>th</sup> day of January, 2012.

Mira Dean-Armorer  
Judge<sup>22</sup>

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<sup>21</sup> Section 15 Freedom of Information Act Ch 22:02

<sup>22</sup> Judicial Research Assistant – Ms. Kendy Jean  
Judicial Secretary – Mrs. Irma Rampersad